In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-841V
Filed: June 3, 2011

KATHERINE McKELLAR Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	)	TO BE PUBLISHED Interim fees; Avera; Undue hardship; Reasonable basis; Reasonableness of attorneys' fees

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for Petitioner.
Lisa Watts, United States Department of Justice, Washington, D.C. for Respondent.

LORD, Special Master.

DECISION ON INTERIM FEES[1]

On February 14, 2011, Petitioner in the above-captioned case filed a motion seeking an award of interim attorneys' fees and costs.[2] Petitioner filed a supplemental application on March 25, 2011 (the original and supplemental petitions are referred to hereafter as the "Application"). Petitioner sought a total award of $18,275.03.

Respondent opposed the Application on the following grounds: (1) under Avera v. Sec'y of Dep't of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), an award

[1] The undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire ruling will be available to the public. Id.

[2] Petitioner's counsel filed the application as the "Final" application for the firm Conway, Homer & Chin-Caplan, P.C. Petitioner's Interim Application for Final Attorneys' Fees and Costs at 1, note 1. This was an attempt to clarify the circumstances under which the application was made. The term "final" was confusing, however, and should not appear in an application for interim fees and costs.

of interim fees and costs was not permitted in these circumstances; (2) the Petition lacked good faith and a reasonable basis, precluding an award under 42 U.S.C. § 300aa-15(e)(1); (3) the amounts requested were excessive.

1. Authorization of Interim Attorneys' Fees and Costs

I am bound to follow Avera. See 42 U.S.C. § 300aa-12(f); see, e.g., Coltec Indus., Inc. v. United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006) (stating there can be "no question" that the Court of Federal Claims is required to follow the precedent of the Federal Circuit).

The Secretary argued that Avera created a narrow set of circumstances under which interim fees may be granted, in the discretion of the special master. I do not construe Avera as creating strict limitations on the awarding of interim fees. But I need not address the scope of Avera in this decision. In this case, counsel for Petitioner is seeking to withdraw from the representation. Counsel's ability to recover fees and costs on an interim basis after withdrawing may be problematic. See Silver v. Sec'y of Dep't of Health & Human Servs., No. 99-462V, 2009 WL 2950503, *9-10 (Fed. Cl. Spec. Mstr. Aug. 24, 2009). Accordingly, I find that, even under the limited circumstances involving undue hardship that the Secretary argues are prerequisite to an award of interim fees, such an award is warranted here. Unless interim fees are awarded to departing counsel, the purpose of the Act to encourage representation of vaccine-injured persons may be thwarted.

2. Good Faith and Reasonable Basis

Respondent asserted that I must evaluate good faith and reasonable basis "in light of the medical records produced by petitioner." Respondent's Opposition to Petitioner's Application for an Award of Attorneys' Fees and Costs (the "Opposition") at 11. While agreeing that Petitioner's medical records disclosed no evidence of a valid claim for compensation, I cannot agree that it necessarily follows that the claim was brought in bad faith or without a reasonable basis.

The Secretary explicitly acknowledged that good faith generally is presumed under the Vaccine Act, and that the question of good faith requires a subjective inquiry. Opposition at 10-11; see generally Grice v. Sec'y of Dep't of Health & Human Servs., 36 Fed. Cl. 114, 121 (1996). The Secretary then disputed the existence of good faith without presenting any facts that addressed the state of mind of the Petitioner. The Secretary cited no authority for the proposition that, "In this case, good faith and reasonable basis must be viewed in light of the medical records produced by the petitioner," which would suggest an objective inquiry. Id. at 11. I decline to adopt that novel approach, which undermines the presumption of good faith. The Secretary also pointed to the lack of a treating physician or expert opinion in support of the Petition. Many cases lack such support and are eventually dismissed, while attorneys' fees are paid.

Traditionally, special masters have been "quite generous in finding a reasonable basis for petitioners." Turner v. Sec'y of Dep't of Health & Human Servs., No. 99-544V, 2007 WL 4410030, *8 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (quoting Turpin v. Sec'y of Dep't of Health & Human Servs., No. 99-564V, 2005 WL 1026714, *2 (Fed. Cl. Spec. Mstr. Feb. 10, 2005)). Special masters have been less generous to petitioners when counsel fails to investigate the facts or continues to prosecute a case after it should have been recognized that the evidence was manifestly insufficient. See, e.g., Perreira v. Sec'y of Dep't of Health & Human Servs., 33 F.3d 1375,1377 (Fed Cir. 1994) (denying fees incurred at hearing when petitioner's counsel knew his expert's opinion was legally insufficient).[3]

The statute does not designate the moment when a "reasonable basis" shall be evaluated. It is accepted, however, that there must be a reasonable basis to proceed with a case at all times; as a result, a case can start out with a reasonable basis and, at some point thereafter, lack a reasonable basis. Perreira, 33 F.3d at 1377. I am reluctant to find that this case lacked a reasonable basis even before the medical records had been collected and reviewed. There is nothing in the Petition itself that indicates it could not succeed, or that it was filed for any improper purpose. The Amended Petition included references to vaccine injury in the medical records. The citations to the medical records may have been incomplete and taken out of context -- that is commonplace, and may be considered advocacy. As I read the Vaccine Act, more is required to justify refusal to award reasonable attorneys' fees. Particularly at an early stage in the proceedings, petitioners are entitled to some leeway to attempt to turn a bad case into a good case, even if they do not succeed.

Perhaps no petition should be filed until the medical records have been collected and the potential merits of a vaccine injury claim have been thoroughly assessed. Under this scenario, however, the risk of incurring costs in an unsuccessful Petition would be placed solely on counsel for petitioners. In the context of the Vaccine Act, with its provisions and underlying policy (unprecedented to my knowledge) of awarding attorneys' fees even to unsuccessful claimants, such a stinting interpretation is insupportable. Under all the circumstances, I conclude that there was a reasonable basis to bring this claim. I therefore grant attorneys' fees notwithstanding the weakness of the claim, which is now evident. Were the claim prosecuted beyond this point, I

[3] See also Murphy v. Sec'y of Dep't of Health & Human Servs., 30 Fed. Cl. 60, 61 (1993), aff'd 48 F.3d 1236 (Fed. Cir. 1995) (affirming special master's finding of no reasonable basis when the medical and other written records contradicted the claims in the petition); Everett v. Sec'y of Dep't of Health & Human Servs., No 91-1115V, 1992 WL 35863 (Fed. Cl. Spec. Mstr. Feb. 7, 1992) (denying fees when the medical records did not support petitioner's claim of an adverse reaction to vaccination and no expert report was filed); Collins v. Sec'y of Dep't of Health & Human Servs, No. 91-821V, 1992 WL 164512 (Fed. Cl. Spec. Mstr. June 23, 1992) (denying fees when the injuries alleged in the petition were not supported by medical records or expert opinion); cf. Turner, 2007 WL 4410030, at *10 (finding a reasonable basis when, after filing a skeletal petition, counsel promptly investigated the case, and "counsel [did] not unduly prolong[] the proceeding but [] moved promptly for judgment on the record" after being unable to find an expert).

would agree with the Secretary that the existence of a reasonable basis to proceed would be very much in doubt.

3. "Excessive" Amounts of Fees Requested

The Secretary objected to duplication of effort by multiple attorneys and paralegals and excessive amounts of time reviewing and summarizing the medical records. In general, I am reluctant to deduct hours for work performed by attorneys because I do not wish to infringe on the ability of counsel to develop vaccine cases in the way they see fit, so long their efforts are reasonable and necessary. See Petitioner's Reply to the Respondent's Opposition to Petitioner's Application for an Award of Attorneys' Fees and Costs (the "Reply") at 15-16.

The Secretary pointed to several instances where fees were claimed for questionable efforts. Counsel for Petitioner agreed that one of these items was misbilled. See Reply at 17. Based on my experience, every human endeavor entails some inefficiency; to a certainty, this is true of the practice of law. Using the standards generally applicable to the legal profession, I do not believe it is appropriate to deduct routinely from attorney compensation because effort might have been allocated more efficiently. I follow the Supreme Court's guidance that the standards applicable to paying clients should also apply when fees are submitted for payment by an opponent or, in this case, by the Vaccine Injury Compensation Program. See Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (a fee request should exclude hours that are "excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission"). It is much easier to detect fruitless efforts with hindsight, and I do not believe it is appropriate for a special master to engage in that exercise. So long as the hours expended appeared to be reasonably directed to result in advancement of the case, I will not refuse to compensate them on the grounds of inefficiency. To do so would hold counsel in the Vaccine Act program to a higher standard than applies to many other private practitioners. [4]

Some of the specific items to which the Secretary objected do seem questionable. The overall amount of the bill submitted appears to be reasonable, however. I would err on the side of compensating Petitioner when in doubt, consistent with the unique statutory purpose permitting me, in the exercise of discretion, to award fees to a losing party. At the same time, I encourage counsel to review applications for fees and costs more carefully to avoid including any questionable charges in future applications.

[4] I have had previous experience reviewing the time entries of this firm and have deducted significant amounts from its submitted bills where it appeared there was no reasonable basis for incurring the fees in question. I conclude, upon review of the time entries in this case, that the amount billed is high but is not beyond reason.

Accordingly, I **GRANT** Petitioners request for $18,255.53.[5] In the absence of a timely motion for review filed pursuant to Vaccine Rule 23, the Clerk is directed to enter judgment according to this decision.[6]

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Special Master

[5] This amount is adjusted by $19.50 to reflect the misbilled item. See Reply at 17; Application at 8.

[6] Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.